

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, et al.,)	05-CV-0329 GKF-SAJ
)	
Plaintiffs,)	
v.)	<u>DEFENDANTS' MOTION TO</u>
)	<u>COMPEL PLAINTIFFS' COMPLIANCE</u>
Tyson Foods, Inc., et al.,)	<u>WITH THE COURT'S ORDER ON</u>
)	<u>DATA PRODUCTION</u>
Defendants.)	
)	

Defendants jointly submit this Motion to Compel Plaintiffs' Compliance with the Court's Order on Data Production and integrated brief in support.

Over the course of the last year, Defendants have doggedly attempted to make Plaintiffs comply fully with Magistrate Judge Joyner's January 5, 2007 Order mandating production of various scientific data gathered by Plaintiffs and their experts. (Dkt. No. 1016.) In light of new evidence that Plaintiffs have actively sought means to avoid compliance with that Order, Defendants are now compelled to ask the Court to revisit the issue once again. Specifically, Defendants request that the Court issue an Order requiring Plaintiffs to disclose all data as required by the Order of January 5, 2007 within ten days or, going forward, within ten days of the generation of any new data. Further, the Court should direct that any data that Plaintiffs do not timely produce under this schedule will be inadmissible at trial either as direct evidence or as expert reliance material.

A. The Court has Ordered Plaintiffs to Produce Data, Testing, Sampling, and Results.

In May 2006, Defendant Cobb-Vantress moved to compel the production of Plaintiffs' monitoring, sampling, and testing data (Dkt. No. 743), data that Plaintiffs had withheld based on claims of attorney-client privilege and work product. In July 2006, Defendant Simmons likewise

moved to compel Plaintiffs to produce all studies, datasets, and documents supporting Plaintiffs' claims of phosphate and nitrogen loading to Lake Tenkiller (Dkt. No. 844), which Plaintiffs also withheld based on claims of attorney-client privilege and work product. In response to the motions, Plaintiffs suggested to the Court that "the sampling data is peripheral to the case," a conclusion the Court flatly rejected. (Order of Jan. 5, 2007: Dkt. No. 1016 at 7.) In its Order, the Court noted that although Plaintiffs attempted to downplay the importance of the data sought, Plaintiffs had in fact "relied upon the information in the First Amended Complaint" and had in "numerous instances ... referenced or relied upon the information in motions to compel and during oral argument in this Court." (*Id.*, docket citations omitted.) Accordingly, the Court was "persuaded that Plaintiffs have relied upon the information that Plaintiffs now seek to protect and shield from discovery." (*Id.*) Based in part on Plaintiffs' prior assertions to the Court that such "samples were unique," the Court additionally found that Defendants sought "sampling data and results that cannot be recreated and can be obtained from no source other than Plaintiffs." (*Id.* at 7-8.) Thus, "denial of the information to Defendants would deny vital information necessary to Defendants' defense." (*Id.* at 8.) Plaintiffs' current motion for preliminary injunction has proven the Court correct; Plaintiffs' case rests almost entirely on expert opinions based on the data that the Court ordered produced more than a year ago.

In its January 5, 2007 Order, the Court unambiguously ordered Plaintiffs to produce "the requested data, testing, sampling, and results." (*Id.*) The Order also required Plaintiffs to produce all documents included in their offer of voluntary production made at the December 15, 2006 hearing, which included the following categories of documents responsive to Defendant Cobb-Vantress's Interrogatory No. 1 and Document Request Nos. 1-2:

- 1) For "each instance of sampling, monitoring or listing:"
 - a) "date and location of sampling,"

- b) “name, address, and telephone number of each person involved in sampling,”
 - c) “media or material sampled,” and
 - d) “all tests or laboratory analysis performed.”
- 2) Copies of “all sampling, monitoring or testing” documents, which includes “laboratory results, assay reports, QA/QC documents, sampling protocols (unless prepared by an attorney), photographs, and site sketches.”
 - 3) Copies of “all documents relating to the scientific investigation of groundwater contamination,” which includes “laboratory results, assay reports, QA/QC documents, sampling protocols (unless developed by an attorney), photographs, and site sketches.”

(*Id.* at 9; see also discovery requests at Dkt. Nos. 743 Ex. 1 at 3-4.) Additionally, the Court ordered Plaintiffs to produce documents submitted for *in camera* inspection as included in the offer of voluntary production (Dkt. No. 1016 at 10), and to supplement their privilege log in keeping with the Order, noting that “Defendants may reurge their motion to compel further production if they think it necessary and appropriate” after reviewing “the production ordered herein and the revised privilege log.” (*id.* at 11). Plaintiffs were to produce all of this information to Defendants by no later than February 1, 2007. (*Id.* at 11.)¹

B. Defendants Have Struggled to Make Plaintiffs Follow the January 5 Data Order.

Plaintiffs came nowhere near completing their production of sampling data and related information by February 1, 2007. Instead, Plaintiffs instituted their own rolling production schedule, producing partially responsive information in an unorganized and sometimes unreadable format on at least February 1, February 8, March 8, May 1, May 21, July 2, August 7, September 17, September 18, September 19, September 25, November 5, November 19, 2007 and January 4, January 22, and January 31, 2008. These piecemeal productions often responded to Defendants’ complaints about Plaintiffs’ failure to fully comply with the January 5, 2007

¹ The deadline for production of Plaintiffs’ field notebooks only was extended a single week by unopposed motion. (Dkt. Nos. 1040, 1042.)

Order. To avoid burdening the Court with every detail of the parties' almost continuous fight over data production since February 1, 2007, Defendants highlight here only a few of the many examples of Plaintiffs' failures.²

Probably the most glaring example discovered thus far of Plaintiffs' concealment of data—and the duplicity underlying that concealment—involves Plaintiffs' DNA data, one of the central issues in the pending motion for preliminary injunction. Plaintiffs produced field notebooks in February 2007 that revealed that they were collecting and analyzing samples as part of an unknown DNA investigation. Plaintiffs later stated that this investigation would allow them to “track” or “fingerprint” substances in water to poultry-litter application sites. (*See e.g.*, Ex. 1: May 1, 2007 Ltr. from L. Bullock to R. George.) Information from this investigation is clearly responsive to (at least) Cobb-Vantress's Interrogatory No. 1 and Document Requests Nos. 1 and 2, which are subject to the January 5 Order. (*See* Dkt. No. 1016 at 9; Dkt. Nos. 743 Ex. 1 at 3-4.)

Despite the Court's Order, however, Plaintiffs initially refused to produce any sampling protocols, data, or other information related to the DNA investigation, instead raising the same attorney-work-product objection the Court had already overruled. In March 2007, Defendants threatened to seek Court intervention if Plaintiffs refused to produce the DNA investigation information. (*See* Ex. 2: Mar. 5, 2007 Ltr. from R. George to L. Bullock.) Meet-and-confer sessions resulted in Plaintiffs' promise to produce the DNA information after the work was complete and the test results had undergone QA/QC analysis (although nothing in the January 5,

² Other examples of late disclosed or undisclosed information subject to the January 5, 2007 Order include, but are not limited to: 1) a key to correlate different sample identifiers used by Plaintiffs for the same samples, 2) readable biological data, 3) agricultural census data, 4) GIS information regarding sample locations, 5) data validation information, and 6) quality assurance

2007 Order permitted Plaintiffs to withhold data on the ground that it had not yet been QA/QC'd). On May 1, 2007, Plaintiffs stated that they needed an additional month or two to complete their testing methodology for the DNA investigation. (See Ex. 1.) To avoid the need for yet another motion to compel, Defendants acquiesced and waited.

On July 3, 2007, Defendants again demanded specific information related to Plaintiffs' DNA investigation. (See Ex. 3: July 3, 2007 Email from R. George to L. Bullock.) After another month's delay, Plaintiffs indicated on August 2, 2007 that they would not produce the standard operating procedure or supporting data for the DNA investigation until sometime in September, "once we have determined the extent to which it is possible to track poultry waste using DNA." (Ex. 4: Aug. 2, 2007 Email from R. Garren to R. George and M. Bond.) At that point, Plaintiffs sought to impose another condition for the already-ordered disclosure: Plaintiffs would produce the data if and only if, prior to the production, the parties agree upon a "suitable protective order" because the "method developed for using DNA to track poultry waste through the environment is proprietary and warrants particular protection." (Id.)³ These delays and demands all violated the Court's Order of January 5, 2007.

By the end of August 2007, Plaintiffs still had not produced the sampling protocol or any data associated with their DNA investigation. On August 29, Defendants again pushed the issue, advising Plaintiffs of serious concerns with the manner in which Plaintiffs had conducted their court-ordered scientific production. (See Ltr. at Dkt. No. 1393-5.) With respect to Plaintiffs' DNA investigation in particular, Defendants stressed the need for immediate production. (Id.)

and quality control ("QA/QC") information. (See, e.g., Dkt. No. 1393-6: Nov. 30, 2007 Letter from R. George to L. Bullock.)

³ Plaintiffs ultimately decided to drop their request to enter into an agreement for a protective order. (See Ex. 5 at 1-2, Sept. 19, 2007 Ltr. from L. Bullock to R. George.)

On September 19, Plaintiffs finally disclosed a sampling protocol for the DNA investigation, SOP 5-3, a document that demonstrates on its face that it was prepared in April 2006. (See Ex. 5 at 2.) In other words, Plaintiffs delayed a year and a half after creating the document and nine months after the Court's Order to produce this information to Defendants, and finally produced it only upon Defendants' specific insistence.

On September 27, Plaintiffs finally produced a summary of some of the data collected in their DNA investigation. (See Ex. 6: Northwind PCR Analytical Summary (or "Summary Report").) The Summary Report confirms that Plaintiffs began collecting samples as part of the DNA investigation as early as February 2006, and shows that the sampling protocol Plaintiffs produced in early September did not actually fit the information summarized in the Report. The sampling protocol (SOP 5-3) indicated that 52 fecal samples from non-poultry sources (beef cattle, dairy cattle, swine, geese, ducks, humans) were to be collected from the IRW and subjected to fragmented "PCR" DNA analysis. "PCR" refers to "Polymerase Chain Reaction," the science underlying Plaintiffs' claimed poultry "biomarker." The Summary Report supposedly based on application of that SOP, however, provided results of Plaintiffs' testing of 31 water, soil, and poultry litter samples that reportedly had undergone quantitative PCR analysis. (See Ex. 7 at 2: Oct. 7, 2007 Ltr. from R. George to L. Bullock.) A comparison of the documents showed that Plaintiffs had failed to produce: 1) any data related to the SOP 5-3 sampling protocol; 2) a sampling protocol associated with the Summary Report; or 3) underlying test results (as opposed to summary information) associated with the Summary Report.

On November 5, Plaintiffs supplemented their production by producing a report concerning what Plaintiffs assert is the development of a biomarker related to their DNA investigation. (See Ex. 8: Nov. 5, 2007 Email from L. Bullock to R. George.) Again, this report

contained only summary information and provides none of the underlying data on which the report was based.

The issue came to another head after Plaintiffs filed their preliminary injunction motion in November 2007. The motion's expert affidavits and expert reliance materials rely on and reference information governed by the January 5, 2007 Order that should have been produced long ago. On November 30, Defendants demanded again that Plaintiffs produce a complete set of all the data analyzed to date related to their DNA investigation, in keeping with the Court's January 5, 2007 Order. On December 19, Plaintiffs sent a letter omitting any mention of their existing obligation under the January 5 Order to produce the DNA-related data and instead offering to produce the data 21 days before Dr. Harwood's deposition in preparation for the preliminary injunction hearing. (See Ex. 9 at 2: Dec. 19, 2007 Ltr. from L. Bullock to R. George.) On December 20, Plaintiffs filed a supplemental affidavit of Dr. Valerie J. Harwood claiming extensive DNA sampling and investigative testing in the IRW and based on the then undisclosed data collected and analyzed as part of Plaintiffs' DNA investigation. (See Dkt. No. 1416-2.) As revealed by Dr. Harwood's recently produced reliance materials, this information was in Plaintiffs' control since at least 2006 and was concealed in total disregard of the January 5, 2007 Order. (See Ex. 10: sample lab progress report.)

C. The 2006 Olsen—Harwood Email Chain Reveals Plaintiffs' True Intent.

In addition, Plaintiffs' experts have revealed communications demonstrating that Plaintiffs did not withhold this data inadvertently or due to any legitimate disagreement about the scope of the discovery sought. Instead, Plaintiffs withheld it simply because they did not want Defendants to see it. On December 7, 2006 – the week before the hearing on the motions to

compel data that resulted in the January 5 Order – Dr. Roger Olsen sent an email entitled “results” to Dr. Harwood and two others. (Dkt. No. 1565-15.) The email states in its entirety:

We are proposing to release “all analytical data” to the defendants. However, we don’t want to release any of the PCR/molecular tracking results at this time. Would the following statement preclude the PCR results?

- We will deliver to Defendants’ copies of *all* chemical and bacteriological analytical results produced by standard analytical procedures and received from commercial labs (excluding any expert directed assessment, manipulation, evaluation, &/or interpretation, and opinions of the analytical results) from all media (litter, soil, gw, surface water (lakes, rivers, streams) springs, & sediments).

If not, any suggestion of additional or different words?

(Id. at 2, sic, italics in original, bolding added.) Over the next few days before the hearing on the motions to compel Plaintiffs’ data, Dr. Harwood and the other recipients each in turn agreed that the above proposed language would, as a matter of semantics, effectively exclude the PCR and molecular tracking / biomarker results that Plaintiffs wished to keep concealed. (Id. at 1.) The four concluded that, as worded, the above offer to produce “all” analytical data would actually allow Plaintiffs to withhold the PCR and molecular tracking / biomarker results because such data is not created through “standard” procedures and because the North Wind lab “is not a commercial lab.” (Id.)

This semantic game prevailed, and Plaintiffs did in fact withhold Dr. Harwood’s PCR work despite the January 5, 2007 Order’s mandate that Plaintiffs produce “for each instance of sampling [or] monitoring ... all tests or laboratory analysis performed,” “copies of all sampling, monitoring or testing” including “laboratory results,” and copies of all documents relating to the scientific investigation of groundwater contamination” including “laboratory results.” (Dkt. No. 1016 at 9.)

Plaintiffs now insist⁴ that this “email related to Dr. Harwood’s effort to see if a bio-marker for poultry waste could be isolated through Polymerase Chain Reaction (‘PCR’) analysis,” merely “relates to the ongoing process of developing a biomarker by the State’s experts, which is protected by Rule 26 rather than the underlying analytical data which the Court had ordered produced ...” (Dkt. No. 1570 at 1-2.) Again, the email itself undercuts this attempted excuse. Entitled “results,” the email begins:

We are proposing to release “all analytical data” to the defendants. However, we don’t want to release any of the PCR/molecular tracking results at this time.

(Dkt. No. 1565-15 at 2.) Plaintiffs’ attempt to construe this email about “analytical data” and “PCR/molecular tracking results” as somehow not relating to the PCR analytical data that the Court ordered produced is simply untenable. Plaintiffs willfully withheld data that this Court has called “vital information necessary to Defendants’ defense.” (See Dkt. No. 1016 at 8.)

The April 1, 2008 deadline for Plaintiffs’ expert disclosures on non-damages issues is fast approaching, and Defendants have only a four-month window in which to prepare and disclose their responsive experts. If additional undisclosed data exists, Defendants need access to it as soon as possible. Defendants do not know, and have no way of knowing, how much more discoverable data Plaintiffs have withheld through strained and disingenuous parsing of Defendants’ discovery requests and the Court’s Orders. Therefore, based on Plaintiffs’ prior conduct, Defendants urge the Court to compel Plaintiffs to disclose any additional withheld data and to make clear to Plaintiffs that any failure to comply will have real consequences at trial.

⁴ Defendants attached the Olsen-Harwood “results” email chain as Exhibit 6 to their Response to Plaintiffs’ Motion for Leave of Court to Supplement Expert Data, arguing that the email is evidence that Plaintiffs’ experts Drs. Olsen and Harwood conspired to conceal their data from discovery by Defendants. (Dkt. No. 1565 at 6.) The passages quoted in the text are from Plaintiffs’ Reply to that evidence.

The Court's existing January 5, 2007 Order should have been enough to compel Plaintiffs to disclose all the data they have gathered concerning the subject matter of this case.

Unfortunately, it was not. Defendants therefore respectfully request that the Court compel Plaintiffs to disclose all data as ordered by the Court on January 5, 2007 within 10 days of the date of the Order on Defendants' instant motion or, in the future, within ten days of the date any new data is generated. Defendants also ask the Court for an Order barring Plaintiffs from any direct or indirect use at trial of any data that Plaintiffs do not disclose in compliance with the Court's Order.

CONCLUSION

For all the above reasons, the Court should compel Plaintiffs to disclose all data as required by the Order of January 5, 2007 within ten days of the date of this Court's Order on this motion or within ten days of the generation of data, whichever is earlier. The Court should also order that all future untimely disclosed data shall be inadmissible by Plaintiffs at trial both as evidence and as expert reliance material.

Respectfully submitted,

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I certify that on the 29th day of February, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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